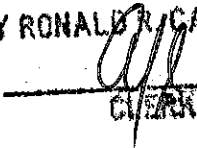


RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 SEP 17 PM 17:05 IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER


Dependency of Peter Tsimbalyuk,
et al.

No. 84458-5

WRITTEN COMMENTS
REGARDING RAP 7.2
AND SUBSEQUENT
TERMINATION ORDERS

COMES NOW the petitioner, Peter Tsimbalyuk, by and through
his attorney, Lila J. Silverstein, responding to the Court's order requesting
written comments as stated below.

I. QUESTION PRESENTED

By order of September 9, 2010, this Court requested "written
comments providing additional information as to the apparent separate
orders entered under King County Superior Court cause numbers 09-7-
04166-9, 09-7-04167-7, and 09-7-04168-5 terminating the Petitioner's
parental rights regarding the same children who are the subject of the
petition for review pending in this court under cause number 84458-5.
Principally, counsel should explain both the factual and procedural basis
and the authority, consistent with RAP 7.2, under which the trial court
entered the orders of termination. Counsel should include any available
and pertinent written documentation."

Dependency of Tsimbalyuk, No. 84458-5

Page 1 of 8

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

ORIGINAL

FILED AS
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II. SHORT ANSWER

The juvenile court denied DSHS's first petition to terminate Peter Tsimbalyuk's relationship with his children, ruling termination would be contrary to the children's best interests and was not necessary to ensure early integration into a stable and permanent home. DSHS moved for discretionary review of that decision in the Court of Appeals and also re-filed a termination petition in the trial court. The Court of Appeals granted the department's motion for discretionary review and reversed, and Mr. Tsimbalyuk sought review of that decision in this Court. Shortly thereafter, the trial court granted the department's second termination petition.

This Court should do one of the following:

1. Grant Mr. Tsimbalyuk's petition for review and strike the subsequently entered termination orders; or
2. Grant Mr. Tsimbalyuk's petition for review and also grant review on the question of whether the trial court had the authority under RAP 7.2 to enter the subsequent termination orders; or
3. Grant Mr. Tsimbalyuk's petition for review notwithstanding the subsequent termination orders because the petition raises issues of substantial public interest.

III. DISCUSSION

a. Procedural History

On July 28, 2008, DSHS filed a petition to terminate Mr. Tsimbalyuk's relationship with his three boys. The boys were living with Mr. Tsimbalyuk's relatives but also spending a lot of time with their father. At the termination trial, at least two of the State's witnesses testified that it would be best for the children to continue to have a relationship with their father even if they lived with their relatives. On March 25, 2009, the trial court denied the termination petition, ruling that termination would be contrary to the children's best interests and that the children were in stable and permanent homes with their paternal aunt and grandmother. The Department then filed a motion to vacate, which was also denied.

On May 13, 2009, the Department filed a notice of appeal to the Court of Appeals, Division One. While the parties were briefing and arguing that case in the Court of Appeals, the Department filed another termination petition in the trial court on October 15, 2009. Exhibit 1 at 1.

On February 16, 2010, the Court of Appeals granted discretionary review of the denial of the first termination petition and remanded to the trial court for reconsideration of the children's best interests. On March 3,

the Department filed a Motion to Publish the Court of Appeal's opinion, asserting that the issues addressed are "a matter of public interest and importance." The Court of Appeals granted the motion to publish. On March 16, 2010, Mr. Tsimbalyuk filed a petition for review in this Court.

On March 26, 2010, the trial court granted DSHS's second termination petition, having denied Mr. Tsimbalyuk's motion to stay the second termination trial pending resolution of the appeal of the first termination trial. Exhibit 1 at 2; Exhibit 2; Exhibit 3.

On April 26, DSHS filed an Answer to Mr. Tsimbalyuk's petition for review, asserting that the issues raised were moot because the trial court had granted the Department's second termination petition. On May 4, 2010, Mr. Tsimbalyuk filed a Reply to DSHS's Answer, arguing that regardless of the subsequent termination orders, this Court should grant review because both parties agree that the published Court of Appeals' opinion involves matters of substantial public interest.

b. Analysis

Under the Rules of Appellate Procedure, "[a]fter review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3" RAP 7.2(a). In other

words, the trial court may *not* act in a case once the Court of Appeals accepts it for review, unless one of the exceptions listed in RAP 7.2 applies. The list of exceptions is exhaustive. 2A K. Tegland, Washington Practice, Rules Practice at 504, 505 (6th ed. 2004).

None of the exceptions applies here.¹ Rather, the question of whether the trial court had the authority to grant the second termination petition while the first was still on appeal comes down to the meaning of the word “case” in RAP 7.2(a). The State may argue that the trial court was acting in a different “case” when granting the second termination petition because the cause numbers were different. But this interpretation elevates form over substance and is an improperly restrictive reading of the word. This Court has explained, “After an appeal is taken, the trial court loses jurisdiction over *the subject matter of the appeal* and cannot change its judgment or orders entered prior thereto, *or do anything that affects the subject matter of the appeal.*” *Sewell v. Sewell*, 28 Wn.2d 394, 396, 184 P.2d 76 (1947) (emphasis added). Only orders that do not “inhere in the appeal or affect it” may be entered in the trial court after the

¹ The exceptions are: settlement of record, enforcement of trial court decision in civil cases, attorney fees and litigation expenses on appeal, postjudgment motions and actions to modify decision, release of defendant in criminal case, questions relating to indigency, supersedeas, stay and

Court of Appeals accepts review. *Id.* at 397. A judgment entered in contravention of this rule is "void and unenforceable." *Tinsley v. Monson & Sons Cattle Co.*, 2 Wn. App. 675, 677, 472 P.2d 546 (1970).

The termination orders entered against Mr. Tsimbalyuk obviously affect the subject matter of the pending appeal. The parties are the same and the questions are the same – whether termination serves the best interests of the children and whether the State has proved the elements of RCW 13.34.180(1). The orders affected the appeal by rendering it moot. Indeed, DSHS purposely mooted out its own appeal after obtaining a published opinion in its favor, and then used the subsequently entered termination orders to urge this Court to deny review in the original appeal. Because the termination orders affected the subject matter of the pending appeal, the trial court lacked the authority to enter the termination orders. The subsequently entered termination orders are void and unenforceable.

DSHS should have chosen either to re-file a termination petition in the trial court or to appeal the denial of the termination petition, but not both.² The Department's dual-track approach in this case violated not only

bond, attorney fees, costs, and litigation expenses, perpetuation of testimony, and multiple parties claims or counts. RAP 7.2(b)-(l).

² Actually, the best action would have been to effectuate the trial court's original ruling, which urged the parties to come to an agreement by which the children could continue to live with their paternal relatives and also see

RAP 7.2, but also principles of judicial economy. As Mr. Tsimbalyuk pointed out in his motion to stay the second termination trial:

The Department chose to file a second termination petition before [its] appeal of the first termination petition was resolved. This was an unusual decision that created a situation not contemplated in the caselaw. The same questions of law and fact are set to be in front of at least two sets of judicial officers – the Washington Supreme Court and the King County Superior Court – at some time in the future. It makes sense that an appeal from the first case should be resolved before the trial court handles the same questions of law and fact.

Exhibit 3 at 3.

In sum, this Court should grant Mr. Tsimbalyuk's petition for review and either strike the subsequently entered termination orders or also grant review on the question of whether the trial court had the authority to enter the subsequent termination orders. Even if this Court leaves the subsequently entered termination orders intact, it should grant Mr. Tsimbalyuk's petition for review for the reasons set forth in the petition for review and reply.

IV. CONCLUSION

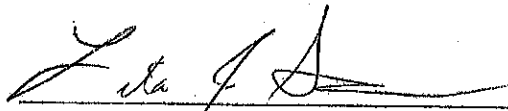
This Court should grant Mr. Tsimbalyuk's petition for review for the reasons set forth in the petition and reply. This Court should also

their father frequently, rather than terminating the rights of the father and children to see each other. But given that the Department was committed

consider either striking the termination orders that were entered while this appeal was pending, or granting review on the additional issue of whether the court had the authority to enter those orders.

DATED this 17th day of September, 2010.

Respectfully submitted,



LILA J. SILVERSTEIN (WSBA 38394)
Washington Appellate Project
Attorney for Father/Petitioner Peter Tsimbalyuk

to termination, it should have chosen one course or the other, not both simultaneously.

EXHIBIT 1

Electronic Court Records

Dept. of Judicial Administration, Office of the Superior Court Clerk's Office

Case Selection

Report Problems

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Help

Select Another Case

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09-7-04166-9

Case Number: 09-7-04166-9 SEA - RIGHTS TERMINATED AS TO FATHER

Case Title: PETER PETROVICH TSIMBALYUK

Activity Log

Filter by Group: All

View Selected Documents

Print

Clear All

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<input type="checkbox"/>	59		<input checked="" type="checkbox"/> 04-26-2010 NOTICE OF WITHDRAWAL OF ATTORNEY	1








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<input type="checkbox"/>	63		 05-27-2010 STATEMENT OF ARRANGEMENTS /MAILED 6/1/10	2

EXHIBIT 2

March 5, 2010 @ 8:30 a.m.

Motion Hearing

Juvenile Presiding or Assigned Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

IN RE THE DEPENDENCY OF:

PETER TSIMBALYUK, dob 9/12/00

JAYCOB IRBY, dob 2/21/05

OSCAR TSIMBALYUK, dob 8/17/06

NO. 09-7-04166-9 SEA

09-7-04167-7 SEA

09-7-04168-5 SEA

MOTION TO STAY PROCEEDINGS TO
AVOID CONFLICTING RULINGS
BETWEEN APPELLATE AND SUPERIOR
COURT

COMES NOW, father Peter Tsimbalyuk, by and through his attorney Alison Warden of Society of Counsel Representing Accused Persons, and hereby moves this Court to stay or continue proceedings in the above-captioned termination trial. The purpose of the motion is to avoid the potential for conflicting rulings on common issues of law and fact between this Court and proceedings mandated by Washington Court of Appeals, Division One under Cause Number 63551-4-I. Exhibit A.

PROCEDURAL BACKGROUND

A. First Termination Trial; March 2009

In July 2008, the Department initiated its first termination proceedings against Mr. Tsimbalyuk in relation to the same three children who are the subjects of the above-captioned

MOTION TO STAY.
Page 1 of 4
SA

**SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS**
1401 East Jefferson Street
Suite 200
Seattle, Washington 98122
(206) 322-8400

1 matter. On March 25, 2009, Judge Ronald Kessler ruled that termination was not in the best
2 interest of the children, finding instead that it was in the children's interests to continue the
3 parent-child relationship with their father through visitation. Judge Kessler further found that
4 the State failed to prove that continuation of the parent-child relationship clearly diminished
5 prospects for early integration into a stable and permanent home, because the children all lived
6 with relatives in stable and permanent placements. The State and CASA moved to reopen the
7 case to offer testimony from the relatives, presumably in support of the Department's position
8 that the placement with relatives was in fact not stable. Judge Kessler denied the motion to
9 reopen the case.
10

11
12 **B. Department's Appeal of Judge Kessler's Ruling**

13 The Department and CASA chose to appeal Judge Kessler's dismissal of the termination
14 petition and Judge Kessler's refusal to reopen the case to allow additional testimony from the
15 relatives. The appeal was assigned cause number 63551-4-I in Division One of the Washington
16 Court of Appeals. The Department asked Division One to overturn Judge Kessler's ruling and
17 hold that he abused his discretion in determining that termination was not in the children's best
18 interests. Additionally, the Department argued that Judge Kessler erred in finding that the State
19 failed to prove the necessary element found in RCW 13.34.180(1)(f): that continuation of the
20 parent-child relationship clearly diminished prospects for early integration into a stable and
21 permanent home (hereinafter referred to as "Element 6").
22

23
24 Oral arguments were heard on January 5, 2010. On February 16, 2010, the Court of
25 Appeals reversed Judge Kessler's ruling in part and remanded for further proceedings. See
26 Exhibit A, Division One's ruling. Division One held that the State had indeed proved the element
27

1 found in 13.34.180(1)(f) (Element 6) because Element 6 necessarily flows from proof of Element
2 5 (13.34.180(1)(e)). Division One found that Judge Kessler committed obvious error by
3 interpreting that statute in favor of Mr. Tsimbalyuk.
4

5 Notably, Division One did not rule that termination was appropriate, but instead,
6 remanded the case back to Judge Kessler to determine whether termination is in the best interest
7 of the children in light of the finding that Element 6 had been proven by the state.

8 **C. Current Procedural Posture of Appeal**
9

10 According to Mr. Tsimbalyuk's appellate attorney, she will file a motion for discretionary
11 review with the Washington State Supreme Court within the next 30 days. See Exhibit 2.
12 declaration of Lila Silverstein. It may be six months before the Court decides whether to accept
13 review of the case. If the Court declines to accept review, the case will be mandatorily remanded
14 to Judge Kessler to make the above-described determination about whether termination is in the
15 best interests of the children.
16

17 **D. Potential for Conflicting Rulings**

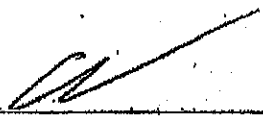
18 The Department chose to file a second termination petition before the appeal of the first
19 termination petition was resolved. This was an unusual decision that created a situation not
20 contemplated in the caselaw. The same questions of law and fact are set to be in front of at least
21 two sets of judicial officers – the Washington Supreme Court and the King County Superior
22 Court, at some time in the future. It makes sense that the appeal from the first case should be
23 resolved before the trial court handles the same questions of law and fact.
24

25 Here, the "law of the case" is not settled and will not be settled until the Washington Supreme
26 Court declines review or makes a ruling in the case. Direction should be taken from the higher
27

1 courts before moving forward in the lower courts on a second petition involving the same parties
2 and facts.

3 For the reasons above, Mr. Tsimbalyuk respectfully requests that this Court stay the
4 proceedings in the above-captioned matter to allow the appellate courts to resolve the common
5 questions of law and fact as applied to these proceedings.
6

7 DATED this 19th day of February, 2010.

8 
9 _____

10
11 Alison Warden

12 Attorney for Peter Tsimbalyuk
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EXHIBIT 3

SCOMIS CODE MHurg

Department 32

Date 3/5/10

Page 1 of 1 Pages

Judge/Commissioner Leroy McCullough

Bailiff/Coordinator Katherine Davis

Courtroom Clerk Melody Kahler

FTR. DR J04 092728 102150

King County Cause Number(s) ✓09-7-04166-9/09-7-04167-7/09-7-04168-5

State of WA vs /In Re the Interest of Peter Tsimbalyuk, Jacob Irby, Oscar Tsimbalyuk

Type of Hearing Motion to Stay

State's Attorney (DPA)/(AA)(i) Marcie Comeau >AAE

Respondent Sandra Street

~~Respondent's Attorney~~ Laurie Reynolds - Casa

Parent(s) Heidi Nagel - atty for Casa

~~JPC/Interpreter/Other~~ Allison Warden > atty for father
Roger Freeman Who is not present

MINUTE ENTRY

Motion to stay is denied.

Judge rules that there is
no causes for continuance.

Trial is continued for 2 weeks.

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STATE OF WASHINGTON

10 SEP 17 PM 4:06
IN THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER

CLERK IN RE P.P.T., ET AL
MINOR CHILDREN

PETER TSIMBALYUK,

PETITIONER.

NO. 84458-5

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **WRITTEN COMMENTS RE: RAP 7.2 AND SUBSEQUENT TERMINATION ORDERS** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TRISHA MCARDLE
ASSISTANT ATTORNEY GENERAL
DSHS DIVISION
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] KATHLEEN SULLIVAN
KAREN BRUNTON
AMANDA BEANE
ATTORNEYS FOR CASA/GAL
1201 3RD AVE STE 4800
SEATTLE, WA 98101

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] PETER TSIMBALYUK
11802 101ST PL NE
KIRKLAND, WA 98034

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2010.

X _____

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: McArdle, Trisha (ATG); abeane@perkinscoie.com; kosullivan@perkinscoie.com;
kbrunton@perkinscoie.com
Subject: RE: TSIMBALYUK-844585

Rec. 9-17-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Friday, September 17, 2010 4:10 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: McArdle, Trisha (ATG); abeane@perkinscoie.com; kosullivan@perkinscoie.com; kbrunton@perkinscoie.com
Subject: TSIMBALYUK-844585

IN RE P.T., et al
No. 84458-5

Please accept the attached documents for filing in the above-subject case:

WRITTEN COMMENTS RE: RAP 7.2 AND SUBSEQUENT TERMINATION ORDERS

Lila J. Silverstein - WSBA 38394
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: lila@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
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